INDEX

	Page
Opinion below	1
Jurisdiction	1
The Question	2
Statement of Facts	2
Argument	5
Conclusion	17

AUTHORITIES CITED

Cases:	
I. C. C. v. *B. & O. R. R. Co.*, 145 U. S. 263	12
United States v. *Chicago & N. W. Ry. Co.*, 127 Fed. 785	5
Statutes:	
Act of May 17, 1856, Sec. 3, c. 31, 11 Stat. 15, 16	6
Act of June 3, 1856, Sec. 3, 11 Stat. 17, 18	6
Act of February 4, 1887, Sec. 22, c. 104, 24 Stat. 379, 387	12
Act of March 2, 1889, Sec. 22, c. 382, 25 Stat. 855, 862	12
Act of March 23, 1910, c. 115, 36 Stat. 243, 256, 257	7, 8
Act of March 3, 1911, c. 209, 36 Stat. 1037, 1050, 1051	7
Act of August 24, 1912, c. 391, 37 Stat. 560, 582, 583	7
Act of March 2, 1913, c. 93, 37 Stat. 704, 715, 716	7
Act of April 27, 1914, c. 72, 38 Stat. 351, 364, 365	7
Act of March 4, 1915, c. 143, 38 Stat. 1062, 1076, 1077	7
Act of August 29, 1916, c. 418, 39 Stat. 619, 633, 634	7
Act of May 12, 1917, c. 12, 40 Stat. 40, 53, 54	7
Act of February 13, 1925, c. 229, 43 Stat. 936	1
Transportation Act of 1920, c. 91, 41 Stat. 456, 479	12
Judicial Code, Sec. 242	1

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 61

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Appellant

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 8, 9) is reported in 59 Ct. Cls. 886.

JURISDICTION

The judgment to be reviewed was entered on amended findings of fact on October 20, 1924 (R. 9), and a petition for appeal was duly filed on January 14, 1925 (R. 9), and allowed on January 19, 1925 (R. 10), under Section 242 of the Judicial Code, before the Act of February 13, 1925. (chap. 229, 43 Stat. 936.)

THE QUESTION

The principal question presented is whether appellant, by filing and publishing a party tariff available to the public generally and requiring the payment of cash in advance for the transportation of passengers traveling in a party, and stating therein that it is not subject to land-grant deduction, can thus nullify the land-grant statutes applying to the transportation of troops of the United States.

STATEMENT OF FACTS

The appellant in the court below instituted suit to recover the sum of $25,609.00 (R. 3) and received judgment in the sum of $120.00 (R. 9).

The appellant is a Kentucky corporation owning and operating a system of railroads in several states, including Mississippi, Alabama, and Florida. Two of appellant's lines, one extending from Decatur, Alabama, to Pensacola, Florida, and the other from Pensacola to River Junction, Florida, were built with the aid of public land granted by Congress to the predecessor in title of the appellant. (R. 4.)

From August 10, 1911, to April 4, 1917, inclusive, the appellant transported, over its lines, upon authorized Government transportation requests, large numbers of officers and enlisted men of the United States Army and Navy. (R. 4.)

There were in force on appellant's lines at the time the transportation was furnished, individual

passenger rates for the public fixed by tariffs duly filed with the Interstate Commerce Commission as required by law. (R. 4.)

There was, in addition to such individual tariff rates, certain party rates open to the public in force on appellant's line at that time, by which ten or more passengers traveling by scheduled trains were entitled to reduced rates. Some of these party-rate tariffs provided that cash should be paid at the time the tickets were issued and that no land-grant should be deducted from such party rates. Other party tariffs provided neither for cash at the time the tickets were furnished nor against land-grant deductions. (R. 5.)

The appellant, as the initial carrier, presented its bills to the proper disbursing officers on Government forms. Where ten or more persons were transported in a troop movement, the appellant billed them at individual rates less land-grant deductions where the rates thus obtained were the lowest rates. Where such net rates were equal to or higher than party rates in force, party rates without land-grant deductions were used by appellant in computing its charges. When appellant's bills thus rendered came before the Accounting Officers for settlement, party rates with land-grant deductions were applied by said Accounting Officers. The appellant filed protests against the deductions from every one of the bills except Bill No. 2402. (R. 5.)

The land-grant deductions made from appellant's bills under party tariffs in force providing for payment of cash at the time the tickets were furnished and against land-grant deductions amounted to the aggregate sum of $23,399.26. The land-grant deductions made from appellant's bills under party tariffs in force, making no provision for payment of cash at the time the tickets were furnished nor against deductions for land grant, amounted to $441.44. (R. 5.)

Appellant rendered its Bill No. 2675 to the Army Disbursing Officer for the transportation of 1,988 United States Troops for special service charges, in addition to their per capita fares, between Hattiesburg and Camp Shelby, Mississippi. The court below found there was nothing in the evidence to show that special or expedited train service between Hattiesburg and Camp Shelby was requested by the Government. (R. 6.)

Appellant also rendered its bills, No. P–2701 and 2703, to the Disbursing Officer for $64.00 for the transportation of 460 United States troops for special service charges between Montgomery and Camp Sheridan, Alabama, in addition to their per capita fares. The court below found that there was nothing in the evidence to show that special or expedited train service between Montgomery and Camp Sheridan was requested by the Government. (R. 7.)

The court found that appellant was entitled to a judgment for $120.00 covering switching charges

on 24 cars of troops between Camp Sheridan and Montgomery, Alabama. (R. 6.) This item is not here disputed.

The court denied a recovery upon any of the other items, and appellant in its brief only discusses the action of the court in refusing to allow a recovery of the land-grant deduction from the party fares. The other questions appear to have been abandoned.

ARGUMENT

The only question argued by appellant in its brief in this case is whether these land-grant deductions are proper. Appellant contends that they are not proper. It urges that the courts have decided that the Government is not entitled to party rates; and, further, that party rates are net rates and are not subject to land-grant deductions. Appellant then insists that by the filing of the tariff providing that the rates therein specified should be paid in advance and should not be subject to land-grant deductions appellant relieved itself of the obligation to carry Government troops and property at land-grant rates, and therefore can deprive the Government of the benefit of such reduced rates.

In appellant's contention that the Government is not entitled to the benefit of a party rate it relies upon the case of *United States* v. *Chicago and Northwestern Railway Company,* 127 Fed. 785, decided by the Circuit Court of Appeals of the Seventh Circuit in 1904. It is hardly necessary to

discuss this case further than to point out that all that such case decided was that the refusal to give the Government the benefit of party rates upon the transportation of soldiers was not a discrimination against the Government, and did not subject it to any undue prejudice or disadvantage in violation of the then existing interstate commerce laws. The case was decided under the specific facts and the specific tariff therein involved, giving reduced rates to theatrical and athletic parties, etc., organized for specific purposes and granted for certain definite reasons. The tickets so issued were limited in their time and were required to be paid for in advance, none of which conditions attached to the transportation of soldiers. The court held that it was not an unjust discrimination or undue prejudice or disadvantage to the Government to be denied this rate, as the Government was not in any way in competition with such theatrical and athletic parties. The soldiers tickets were not limited in time and were not paid for in advance. The case in no way involved any question as to railroads who were under obligations by virtue of land grants made to them to carry troops of the United States at the lowest rate open to the public.

The appellant is a corporation, and part of its lines were aided by grants made by Congress. The Act of May 17, 1856 (Chap. 31, 11 Stat. 15, 16), and the Act of June 3, 1856 (Chap. 41, 11 Stat. 17, 18), granted lands in aid of the construction of

these lines and, in Section 3 of each of said Acts, it was specifically provided that:

> The said railroads and branch shall be and remain public highways for the use of the Government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States.

By virtue of the appropriation acts for the years in which these transportation services here in question were performed, the appellant was required to transport Government troops at a rate of not to exceed fifty per cent of the lawful rate open to the public for similar and like services. (See the following appropriation acts:)

> Act of March 23, 1910 (Chap. 115, 36 Stat. 243, 256–257).
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> Act of March 3, 1911 (Chap. 209, 36 Stat. 1037, 1050–1051).
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> Act of Aug. 24, 1912 (Chap. 391, 37 Stat. 569, 582–583).
>
> Act of Mar. 2, 1913 (Chap. 93, 37 Stat. 704, 715–716).
>
> Act of April 27, 1914 (Chap. 72, 38 Stat. 351, 364, 365).
>
> Act of Mar. 4, 1915 (Chap. 143, 38 Stat. 1062, 1076–1077).
>
> Act of Aug. 29, 1916 (Chap. 418, 39 Stat. 619, 633, 634).
>
> Act of May 12, 1917 (Chap. 12, 40 Stat. 40, 53, 54).

A typical act is the appropriation act for the fiscal year 1911, said appropriation act being the

Act of March 23, 1910, (Chap. 115, 36 Stat. 243, 256). After appropriating for the transportation of the Army and its supplies, it provided that such appropriation might be used—

> for the payment of army transportation lawfully due such land-grant railroads as have not received aid in government bonds (to be adjusted in accordance with the decisions of the Supreme Court in cases decided under such land-grant acts), but in no case shall more than fifty per centum of full amount of service be paid: Provided, That such compensation shall be computed upon the basis of the tariff or lower special rates for like transportation performed for the public at large, and shall be accepted as in full for all demands for such service: Provided further, That in expending the money appropriated by this Act a railroad company which has not received aid in bonds of the United States, and which obtained a grant of public land to aid in the construction of its railroad on condition that such railroad should be a post route and military road, subject to the use of the United States for postal, military, naval, and other government services, and also subject to such regulations as Congress may impose restricting the charge for such government transportation, having claims against the United States for transportation of troops and munitions of war and military supplies and property over such aided railroads, shall be paid out of the moneys appropriated by the foregoing provision only on

> the basis of such rate for the transportation of such troops and munitions of war and military supplies and property as the Secretary of War shall deem just and reasonable under the foregoing provision, such rate not to exceed fifty per centum of the compensation for such government transportation as shall at that time be charged to and paid by private parties to any such company for like and similar transportation; and the amount so fixed to be paid shall be accepted as in full for all demands for such service; * * *.

In other words the statutes provided that such transportation should be performed for the Government at fifty per cent of the charge made for such railroad companies to the public for similar services, and that such amounts should be accepted as in full for all demands for such services.

Prior to the time of the service here in question the appellant had filed with the Interstate Commerce Commission tariffs which were open to the public and which fixed the individual passenger rates for the public, and had also filed other tariffs open to the public providing that where ten or more persons were in a party traveling on scheduled trains they were entitled to reduced rates. Some of these party rates provided that these rates should be paid at the time the tickets were issued and that there should be no land-grant deductions made from such party rates. Others provided neither for cash at the time the tickets were furnished nor

against the land-grant deductions from such party rates. The appellant transported large numbers of officers and enlisted men of the Army. In some instances there was a single passenger; in others there was more than one but less than ten; and in others there were many more than ten. The appellant rendered its bills as follows: Where ten or more persons were transported in one movement they were billed at individual rates less land-grant deductions unless this exceeded the party rate without land-grant deductions; but if such net rates were equal to or higher than the party rates, then the appellant billed at the party rates without land-grant deductions. The accounting officers of the Government settled the bills upon the basis of party rates less land-grant deductions, and to this the appellant protested except as to one bill. The amount of such deductions made by the Government was $23,399.26 in cases where the tariff required payment in cash in advance. The amount deducted in cases where no such requirement was made in the tariff was $441.44. There is one item upon which there was a deduction of $1,789.36, to which appellant did not protest, and this amount is included in said sum of $23,399.26. (R. 6.)

By virtue of the land grant statutes the Government aided the construction of these lines of railroad by the giving of land; and in return, by accepting such land, the railroad company agreed that the Government should be entitled to the carriage of its troops without charge. Congress in

the appropriation acts authorized the payment to such roads of a sum not to exceed fifty per cent of the charges made by the railroad company to the public for like and similar transportation services. This arrangement has a double claim of binding effect upon the appellant, First, as a contract, and Secondly, as a statute of the United States. The court has found that these party rates are open to the public, and it is difficult to understand why, in view of the land-grant and appropriation statutes, not only this party rate but also this party rate with land-grant deductions is not open to the United States. In fact appellant in rendering bills at party rates, when these were lower than individual rates less land-grant deductions, conceded that the Government was at least entitled to party fares even though the Government had not paid cash in advance. The whole theory of the land grant laws is to the effect that the Government shall receive a reduced rate from any rate open to the public; and if it is once shown, as the court has found in this case, that such rate is open to the public, the Government is certainly entitled to the same under such land-grant laws and appropriation acts unless there is some specific reason which brings about a different result.

The appellant contends that this reason is furnished by the provision of the tariff that the party rates therein fixed should be paid in advance or at the time of the issue of the tickets, and that the same should be without land-grant deductions.

They intimate that unless the Government was required to observe these conditions it would be an unjust discrimination in favor of the Government. However, this Court has held that the principal object of the Interstate Commerce Act was to secure just and reasonable charges, prohibit unjust discrimination, and prevent undue and unreasonable preferences. (*I. C. C.* v. *B. & O. R. R. Co.*, 145 U. S. 263, 276.)

A careful examination of the acts of Congress dealing with this subject shows that the Government is expressly excepted from all provisions relating to the relations between common carriers and private shippers. Section 22 of the original Interstate Commerce Act, approved February 4, 1887 (Chap. 104, 24 Stat. 379, 387), provided "that nothing in this act shall apply to the carriage, storage, or handling of property free or at reduced rates for the United States." The same exception appeared in Section 22 of the Act of March 2, 1889 (Chap. 382, 25 Stat. 855, 862), and in all of the subsequent amendments to the Interstate Commerce Acts this exception in favor of the Government has not been disturbed. It might be pertinent to here observe that, while passed after the transactions here in question, similar and enlarged provisions in this respect appear in Section 3 of the Transportation Act of 1920 (Chap. 91, 41 Stat. 456, 479). Clearly, therefore, the giving to the United States of a reduced rate or even the failure to require the payment of cash in advance which

was enforced as to all other shippers is not a discrimination or a violation of the Interstate Commerce Acts.

In substance the appellant is seeking to avoid its obligations and its agreement granted by the statutes and by its acceptance of this land aid by filing with the Interstate Commerce Commission a rate which provided that cash should be paid at the time of the issue of the tickets and that the rate specified therein should be without land-grant deductions. If in this way the railroad could be relieved of its obligations and the effect of these statutes, there is no reason why it could not be so relieved as to every item of Government transportation by the mere filing of a tariff or schedule covering the same, either providing for the payment in advance in cash, or that the rate should be without land-grant deductions. The railroad would be thus enabled to break its contract, and the Government would thus be deprived of the consideration which it expected to receive and which appellant agreed to give because of the granting of these lands; which lands the appellant has accepted and used, and from which it has benefited. The law will not permit such as this to be done.

In the operation of the Government under the existing laws, the rules and regulations of which the railroad well knew, and under which the Government, with the knowledge of the railroads, has operated for many years past, it is a physical impossibility to pay for Government transportation

at the time of the issuing of the ticket. There is no way by which the Government does or can advance money to its officers to pay in cash at the time of the issuing of their tickets. The laws, the rules, and the regulations contemplate that for Government services bills shall be rendered, and they shall have the proper consideration by several Government officials before they are paid. They must be approved and checked and warrants drawn in payment thereof. Where land-grant routes are involved there is hardly a station agent who could figure a rate based thereon. There are few, if any, Government officials who know what railroads are land-grant railroads. Often the grants were made to certain corporations, and by virtue of consolidations, mergers, and other proceedings these land-grant roads have now passed into the hands of companies of entirely different names from those to whom the grants were originally issued, so that if we even indulge in the presumption that the officers of the Government are charged with notice of the land grants as contained in the statutes, still there is no practical way by which they could obtain this other information. Therefore the condition imposed of the payment of cash at the time of the issuing of the tickets, so far as the Government is concerned, is a condition impossible of performance and a condition that is contrary to all laws, rules, and regulations concerning the payment of Government bills. The condition is contrary to the course of dealings

which had been going on between the railroads and the Government for many years past. Further than this, the railroad waived the condition in this case.

From the great mass of cases considered by this Court, and from the departmental rules, regulations, and statutes concerning the same, this Court will take judicial notice of the fact that for many years past it had been the custom of the Government and of the railroads in their course of dealings not to require cash in advance. The Government transportation requests (because of the great number used) were upon printed forms presented to the railroad companies, and upon this the necessary tickets and transportation were given. Under these circumstances the Government was entitled to assume that these transportation requests upon which the Government would be billed, were accepted in lieu of cash just as the railroads had done for many years past. There is nothing in this record showing any request by the railroad company for payment in advance, and by accepting the transportation request, and furnishing the services so requested, the railroad company in view of the long-established custom waived the requirement of the tariff that cash must be paid in advance. The appellant even billed part of such services at party rates, even though no cash had been paid in advance. It can therefore not now be heard to complain, as it was entirely within its power to

waive such requirement as to the Government. To do so was no unlawful discrimination or concession.

It might also be pointed out that the statutes requiring the railroads to transport at fifty per cent of the rate charged to the public provided that it should be fifty per cent of a rate charged to the public for *like and similar transportation.* If the public could procure certain transportation services at a given rate, under the law and the agreement the Government could procure like and similar transportation services at fifty per cent of such rate. The time of the payment for such services was not any part of the conditions of the Government's right to the deductions. If the *transportation* service which it desired was *like and similar* to that which the public might procure at a certain rate, the right of the Government to the deduction was absolute, regardless of when it paid for the same. The time of payment is not a part of the *service.* The statute only requires that the transportation service (not the time of payment) must be like and similar to that given the public under the tariff.

The only effect of the provisions of the tariff which stated that the rate therein fixed should be without land-grant deductions would be a direct attempt to remove the obligations upon the appellant created by its agreement and by the statutes. Land-grant provisions are not applicable to the public generally, and therefore a provision attempting to do away with land-grant deductions can have

no application to the public. It can apply only to the Government and to Government transportation. This was therefore a direct attempt to do away with the obligations of the railroad to the Government in this respect. It was not a condition applicable to the public, because it could have no such application, and for this reason, as well as the others above discussed, under even a strict interpretation of the statutes, it could have no application to the Government. For the reasons heretofore discussed, it is believed that such a condition is illegal and void and of no effect whatsoever.

CONCLUSION

For the reasons above set forth, it is respectfully submitted that the judgment of the Court of Claims is proper and should be affirmed.

Respectfully submitted.

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NOVEMBER, 1926.